

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Orig. w/affidavit of mailing

75-1270

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P/S*

To be argued by
CHARLES E. CLAYMAN

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 75-1270

UNITED STATES OF AMERICA,

Appellee,

—against—

ERNST OLSEN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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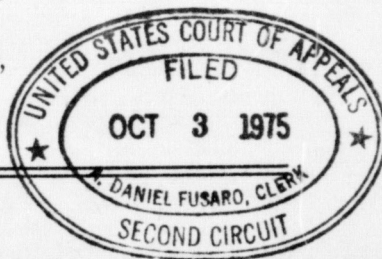




TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	2
1. The Trial	2
a. The August 1968 Transaction	3
b. The Conspiracy (January, 1969 until June of 1970)	3
c. Subsequent Drug Transaction (June 1971 through March 1972)	5
2. Sentencing Proceedings	6
ARGUMENT:	
POINT I—The trial court properly admitted evidence of similar acts	7
POINT II—Appellant's claim that the circumstances of his arrest voids his subsequent conviction is insufficient to warrant any relief and was waived by the untimely manner in which it was raised	10
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:

<i>Lujan v. Gengler</i> , 510 F.2d 62 (2d Cir. 1975)	10
<i>Sewell v. United States</i> , 406 F.2d 1289 (8th Cir. 1969)	10

<i>United States v. Bilotti</i> , 380 F.2d 649 (2d Cir.), <i>cert. denied</i> , 389 U.S. 944 (1967)	8
<i>United States v. Birrell</i> , 447 F.2d 1168 (2d Cir.), <i>cert. denied</i> , 404 U.S. 1025 (1972)	8
<i>United States v. Blasingame</i> , 427 F.2d 329, 331 (2d Cir. 1970), <i>cert. denied</i> , 401 U.S. 945 (1971) ..	9
<i>United States v. Bozza</i> , 365 F.2d 206 (2d Cir. 1966)	8
<i>United States v. Bradwell</i> , 388 F.2d 619 (2d Cir.), <i>cert. denied</i> , 393 U.S. 867 (1968)	8
<i>United States v. Braverman</i> , 376 F.2d 249 (2d Cir. 1967)	8
<i>United States v. Brettholz</i> , 485 F.2d 483 (2d Cir. 1973)	7
<i>United States v. Deaton</i> , 381 F.2d 114 (2d Cir. 1967)	8
<i>United States v. DeCiccio</i> , 435 F.2d 478 (2d Cir. 1970)	8
<i>United States v. DeSapio</i> , 435 F.2d 272, 280 (2d Cir. 1970)	9
<i>United States v. Drummond</i> , 511 F.2d 1049 (2d Cir. 1975)	8
<i>United States v. Eury</i> , 268 F.2d 517 (2d Cir. 1959)	8
<i>United States v. Gardin</i> , 382 F.2d 601 (2d Cir. 1967)	8
<i>United States v. Jones</i> , 374 F.2d 414 (2d Cir. 1967)	8
<i>United States v. Kahaner</i> , 317 F.2d 459 (2d Cir. 1963)	8
<i>United States v. Keilly</i> , 445 F.2d 1285 (2d Cir.), <i>cert. denied</i> , 406 U.S. 962 (1972)	7
<i>United States v. Klein</i> , 340 F.2d 547 (2d Cir.), <i>cert. denied</i> , 382 U.S. 850 (1965)	8

	PAGE
<i>United States v. Knohl</i> , 379 F.2d 427 (2d Cir. 1967)	8
<i>United States v. Lira</i> , — F.2d — (2d Cir. 1975) ...	10
<i>United States v. Marquez</i> , 322 F.2d 162 (2d Cir. 1964)	8
<i>United States v. Miller</i> , 479 F.2d 1315 (2d Cir. 1973)	8
<i>United States v. Monks</i> , — F.2d — (2d Cir. Slip Opinions 2583, March 28, 1975)	7
<i>United States v. Papadakis</i> , 510 F.2d 287 (2d Cir. 1975)	7
<i>United States v. Rivera</i> , — F.2d — (2d Cir. Slip Opinions 4573, 4580, July 2, 1975)	7
<i>United States v. Robbins</i> , 340 F.2d 684 (2d Cir. 1965)	8
<i>United States v. Rosenberg</i> , 195 F.2d 583 (2d Cir. 1954)	10
<i>United States v. Ross</i> , 321 F.2d 61, (2d Cir.), <i>cert. denied</i> , 375 U.S. 894 (1963)	8
<i>United States v. Super</i> , 492 F.2d 319 (2d Cir. 1974)	9
<i>United States v. Toscanino</i> , 500 F.2d 267 (2d Cir.), <i>Petition for rehearing en banc denied</i> , 504 F.2d 1380 (1974)	10
<i>United States v. Warren</i> , 453 F.2d 738 (2d Cir.), <i>cert. denied</i> , 406 U.S. 944 (1972)	7



United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1270

UNITED STATES OF AMERICA,

Appellee,

—against—

ERNST OLSEN,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Ernst Olsen appeals from a judgment entered in the United States District Court for the Eastern District of New York (Mishler, C.J.) after a jury trial which convicted him of (1) conspiracy in violation of 21 U.S.C. §§ 174 (Count One) and (2) importing into the United States a total of approximately five kilograms of heroin (Count 2) and ten kilograms of opium (Count 3) in violation of 21 U.S.C. § 173. Appellant is currently serving the five year prison term imposed by the district court.

The three count indictment charged that during the period from January 1969 through June 1970 fifteen named defendants (including the appellant), together with five co-conspirators not named as defendants, knowingly and wilfully conspired to import and to receive, conceal, buy, sell and facilitate the transportation and concealment of heroin and opium knowing the same to

have been illegally imported.¹ The indictment also charged the importation of five kilograms of heroin and ten kilograms of opium.

On appeal, appellant claims that (1) his legal abduction from a "non-consenting sovereignty" voids his conviction, and (2) inclusion of evidence of prior and subsequent similar crimes not charged in the indictment denied him a fair trial. No challenge is made with respect to the sufficiency of the proof of appellant's guilt.

Statement of the Case

1. The Trial

The Government's case rested primarily on the testimony of Wong Shing Kong (Wong) and Lam Kin Sang (Lam) both named as co-conspirators but not as defendants in the indictment.²

The evidence revealed that the appellant was involved in an international narcotics conspiracy the purpose of which was to smuggle heroin and opium into the United

¹ Of the fifteen defendants, appellant was the only one proceeded against at the instant trial. Four have pleaded guilty; one had the case against him dismissed on double jeopardy grounds; nine are currently fugitives.

² Their testimony was corroborated in many respects by passports, seaman records and logs of various vessels of the Maersk Lines which showed the activities of the appellant and other co-conspirators at various times of the conspiracy.

The other Government witnesses were George Sun, a co-defendant who pleaded guilty to a superseding information, and John Thomsen, who had been convicted in the Eastern District of New York of violating, 21 U.S.C. 841(a)(1), involving a transaction referred to during the course of the trial.

States from the Far East. During the course of the conspiracy appellant was a seaman aboard various Maersk Line vessels which travelled from the Far East to the United States. His function in the conspiracy was to facilitate the smuggling of the narcotics into this country. He would receive the narcotics from Wong and then would either smuggle them himself into the United States or recruit other seamen to act as couriers. Once the narcotics arrived here, they were delivered to Lam or to Wong, who at various times would travel to the United States to take delivery of the narcotics.

a. The August 1968 Transaction

In August of 1968 the witness Wong was working as an electrician aboard the Nicoline Maersk (T. 6).³ As a result of conversations with Yeung Tak and Wu Lung Kei in Hong Kong and Singapore he was supplied with 20 pieces of heroin (T. 18-19). Prior to receiving the heroin he had commissioned the appellant, also a seaman aboard the Nicoline Maersk, to aid him in removing the heroin from the ship when it arrived in the United States. The appellant agreed to help Wong and was to be paid one-half unit of heroin for his participation⁴ (T. 20-21). When the ship eventually arrived in Philadelphia, appellant and two other seamen removed the heroin from the ship and delivered it to Mr. Wong and Mr. Ching, the ultimate purchaser of the heroin (T. 23).

b. The Conspiracy (January, 1969 until June of 1970)

In January of 1969 Wong was in Singapore while working aboard the Nicoline Maersk. He met Mr. Wong Sun Yee who provided him with 10 pounds of opium

³ T. refers to the transcript; A. refers to Appellant's Appendix.

⁴ A piece or unit is equivalent to 700 grams (T. 19).

which Wong placed aboard his ship and brought to the United States (T. 26-27). He was aided in finding a customer for the opium by George Sun, who was living at 190 Bay 19th Street in Brooklyn. Sun introduced Wong to a Mr. "Cheng" who purchased the 10 pounds of opium for \$6,000. Wong then returned to Hong Kong in June aboard the Clifford Maersk (T. 29-30, 297-299).

While in Hong Kong, in June of 1969, Wong received a communication from George Sun informing Wong that another customer for narcotics had been located in the United States. Wong also heard from appellant who sent him a letter in which he informed Wong of the schedule of his current ship the "Lexa Maersk" and requested to participate in future narcotics dealings (T. 34-35, 300). Around this same time Wong was introduced to a supplier of narcotics, one Cheng Kin Fai and a plan was devised to place narcotics aboard appellant's ship when it arrived in Malaysia, one of the stops on the itinerary (T. 37).

Shortly thereafter Wong and the appellant met in Hong Kong at which time appellant agreed to place the narcotics aboard his ship and to recruit more seamen to aid in future smuggling activities. He also informed Wong that the ships itinerary had been changed and it would be stopping in Bangkok not Malaysia (T. 38).

When appellant's ship arrived in Bangkok, he assisted a corrupt immigration officer in placing 3 units of heroin and 20 pounds of opium in his cabin (T. 40-41). The ship then travelled from Bangkok to Singapore, where appellant was informed by Wong that additional narcotics would be provided him in Manila. When the ship arrived in Manila, in November of 1969, the appellant received the additional quantity of heroin which he secreted in his cabin (T. 41-44).

In January of 1970 appellant's ship, the Lexa Maersk, arrived in the United States and docked at a wharf in Brooklyn, in his cabin was located the five kilograms of heroin and ten kilograms of opium. Appellant telegraphed Wong in Hong Kong of the ship's arrival and Wong then flew to the United States where he was met by George Sun (T. 46-47). Assisted by Wong, appellant and two other seamen removed the narcotics from the ship and brought it to George Sun's house where it was stashed under the refrigerator (T. 49-51, 300-05). Appellant then rejoined his ship which was travelling to Baltimore.

Subsequently Wong proceeded to dispose of the narcotics with the assistance of Lam who procured the customers (T. 52-58, 309-16). After appellant's ship arrived in Baltimore, he telephoned Wong and then travelled to New York by bus to receive his payments. Wong met appellant at the bus station and paid him \$3,000 (T. 54). In March of 1970 Wong left the United States and Lam sold the remainder of the heroin (T. 58, 316). (This concluded the conspiracy charged in count I of the Indictment.)

c. Subsequent Drug Transactions (June 1971 through March 1972)

In June of 1971 Wong and appellant met in Bangkok and discussed future importation of narcotics into the United States (T. 59). They met again in Hong Kong in August of 1971 at which time appellant received four suitcases containing 15 units of heroin. Appellant carried two of these suitcases to the United States aboard an airplane and shipped the other two aboard another airplane (T. 70-71). When he arrived in New York he was met by Lam who took delivery of the heroin (T. 317-320).

In September of 1971 when the appellant returned to Bangkok he met again with Wong and agreed to recruit couriers for future smuggling of narcotics into the United States. He was to pay \$2,000 for each shipment. Over the next several months, on approximately ten occasions, appellant provided the couriers to smuggle heroin into the United States and Canada (T. 72-74). One of these couriers was John Thomsen who was recruited by the appellant in October of 1971 while his ship, the Luna Maersk was in Bangkok. Thomsen agreed to carry three suitcases containing heroin into the United States and was given the suitcases by appellant. When his ship arrived in the United States, Thomsen checked the three heroin laden suitcases at the Swedish Seaman's Center in New York in appellant's name (T. 380-386).

In November of 1971 appellant and Wong travelled to New York and took delivery of two additional suitcases containing heroin. Appellant then proceeded to Canada with one suitcase containing heroin (T. 320-321). Appellant returned to New York in March of 1972 and delivered the three suitcases containing heroin, which had been checked by Thomsen at the Seaman's Club, to Lam (T. 322).

The defendant did not put in a defense, but attempted on cross-examination to show that the Government's main witness did not meet appellant until after the period charged in the conspiracy.

2. Sentencing Proceedings

At the time of sentencing, July 11, 1975, the appellant was asked by the court if he had anything to say. For the very first time, over six months after his arrest, he stated that he had been kidnapped. The gist of his allegations, which were elicited in a colloquy with the court,

was that he was arrested while aboard a Danish vessel which was outside the United States Canal Zone. Appellant's counsel stated that he had conducted his own limited investigation into this matter and had found no basis to challenge the jurisdiction of the court (A. 69). The court found no credible evidence to indicate that the ship was not in the Canal Zone (A. 70).

ARGUMENT

POINT I

The trial court properly admitted evidence of similar acts.

The term of the conspiracy as charged in the indictment was the period between January 1, 1969 and June 30, 1970, both dates alleged as being approximate and inclusive. Appellant contends that he was denied a fair trial because the court admitted evidence concerning pre-conspiracy and post-conspiracy opium and heroin transactions.

The firmly entrenched rule in this Circuit, concerning evidence of other criminal acts, is an inclusionary one: "Other crimes evidence is admissible on the government's case in chief unless introduced solely to show the defendant's criminal character, provided that its probative worth outweighs its potential prejudice". *United States v. Rivera*, — F.2d — (2d Cir. slip opinions 4573, 4580; July 2, 1975).⁵

⁵ The Second Circuit has consistently upheld this inculsory form of the rule. See, e.g., *United States v. Monks*, — F.2d — (2d Cir. slip op., 2583; March 28, 1975); *United States v. Papadakis*, 510 F.2d 287 (2d Cir. 1975); *United States v. Brettholz*, 485 F.2d 483 (2d Cir. 1973); *United States v. Warren*, 453 F.2d 738 (2d Cir.), cert. denied, 406 U.S. 944 (1972); *United States v.*

[Footnote continued on following page]

Moreover, as the Court of Appeals recently stated in *United States v. Papadakis*, *supra*, at 294, "despite the efforts of defense lawyers to stem the tide, the flow has been constant."

In the instant case, the government offered evidence of appellant's prior and subsequent narcotics transactions not to prove his criminal character, but to prove his intent to enter into the conspiracy charged, his knowledge of what he was doing, and the organization and structure, as well as the background and development of the conspiracy. As uniformly permitted by the cases in this Circuit, and approved by the commentators, such evidence is admissible for those purposes. See McCormick, Evidence § 190 at 447 et seq. (2d ed. 1972); Wigmore, Evidence § 300 at 192-193 (3d ed. 1940); *United States v. Miller*, 479 F.2d 1315 (2d Cir. 1973); *United States v. Birrell*, 447 F.2d 1168 (2d Cir.), *cert. denied*, 404 U.S. 1025 (1972); *United States v. DeCiccio*, 435 F.2d 478 (2d Cir. 1970); *United States v. Bozza*, *supra*, *United States v. Klein*, 340 F.2d 547 (2d Cir.), *cert. denied*, 382 U.S. 850 (1965); *United States v. Robbins*, 340 F.2d 684 (2d Cir. 1965); *United States v. Ross*, 321 F.2d 61 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963). *United States v. Drummond*, 511 F.2d 1049 (2d Cir. 1975).

Keilly, 445 F.2d 1285 (2d Cir.), *cert. denied*, 406 U.S. 962 (1972); *United States v. Bradwell*, 388 F.2d 619 (2d Cir.), *cert. denied*, 393 U.S. 867 (1968); *United States v. Gardin*, 332 F.2d 601 (2d Cir. 1967); *United States v. Deaton*, 381 F.2d 114 (2d Cir. 1967); *United States v. Bilotti*, 380 F.2d 649 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967); *United States v. Knohl*, 379 F.2d 427 (2d Cir. 1967); *United States v. Braverman*, 376 F.2d 249 (2d Cir. 1967); *United States v. Jones*, 374 F.2d 414 (2d Cir. 1967); *United States v. Bozza*, 365 F.2d 206 (2d Cir. 1966); *United States v. Marquez*, 322 F.2d 162 (2d Cir. 1964); *United States v. Kahaner*, 317 F.2d 459 (2d Cir. 1963); *United States v. Eury*, 268 F.2d 517 (2d Cir. 1959).

In *United States v. Papadakis*, *supra* at 294-295, the Court of Appeals stated: "The charge of conspiracy to commit criminal acts always requires proof of a course of conduct that will circumstantially prove the corrupt agreement. There is no more convincing proof to a jury than that of a pattern of conduct which unfolds before their eyes." In the present case, as in *Papadakis*, the evidence is probative of a pattern of conduct engaged in by the appellant "of which the crime charged [is] a part, *United States v. Blasingame*, 427 F.2d 329, 331 (2d Cir. 1970), *cert. denied*, 401 U.S. 945 (1971); see *United States v. DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970)", *Ibid* at 295.

Moreover, it was a part of appellant's defense that the Government's main witness, Wong, did not meet appellant until after the period of the conspiracy charged in the indictment. Through cross-examination appellant attempted to show that Wong was mistaken when he identified appellant as the seaman who participated in the importation of opium and heroin into the United States (T. 114, 115, 121, 122, 179). Thus the other crime evidence rebuts this argument and is probative of the identity of the co-conspirator. *United States v. Super*, 492 F.2d 319 (2d Cir. 1974).⁶

⁶ The passing reference to jewelry smuggling (T. 292) (which was not objected to by appellant at the time of trial) occurred as a result of the cross-examination of Wong by defense counsel (T. 267-268). Having opened the door to this testimony, it is rather gratuitous of appellant to now object to its admission.

POINT II

Appellant's claim that the circumstances of his arrest voids his subsequent conviction is insufficient to warrant any relief and was waived by the untimely manner in which it was raised.

To invoke the doctrine of *United States v. Toscanino*, 500 F.2d 267 (2d Cir.), *petition for rehearing en banc denied*, 504 F.2d 1380 (1974) in an attack on the illegality of this arrest is mere cavil. Appellant's claims are totally unsubstantiated and frivolous.

The threshold issue here is whether appellant's claim may be raised for the first time after his conviction. We submit that it may not. The untimely nature of this claim constitutes a waiver of appellant's right to challenge personal jurisdiction. See *United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1954), *Sewell v. United States*, 406 F.2d 1289 (8th Cir. 1969).

Even assuming, *arguendo*, that the ship was outside the Canal Zone, appellant's allegations are patently inadequate to entitle him to any relief under the holdings of *Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975) and *United States v. Lira*, — F.2d — (2d Cir. 1975).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: October 3, 1975

Respectfully submitted,

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Eastern District of New York.*

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

----- EVELYN COHEN -----, being duly sworn, says that on the 3rd
day of October, 1975 -----, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, a BRIEF FOR APPELLEE -----
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

----- Irving Katcher, Esq. -----

----- 38 Park Row -----

----- New York, N. Y. 10038 -----

Sworn to before me this
3rd day of Oct. 1975

Robert S. Morgan
ROBERT S. MORGAN
Notary Public, State of New York
No. 24-4501965
Qualified in Kings County
Commission Expires March 30, 1977